



1121 L STREET, SUITE 802
SACRAMENTO, CALIFORNIA 95811
(916) 476-5052



842 SIXTH STREET, SUITE 7
P.O. BOX 2157
LOS BANOS, CALIFORNIA 93635
(209) 826-9696 - OFFICE
(209) 826-9698 - FAX

January 28, 2011

Via Electronic Mail and U.S. Mail

Delta Stewardship Council
980 Ninth Street, Suite 1500
Sacramento, California 95814

RE: Notice of Preparation
Draft Environmental Impact Report for the Delta Plan

Dear Chairman Isenberg and Council Members:

The State and Federal Contractors Water Agency ("SFCWA") and San Luis & Delta-Mendota Water Authority ("SLDMWA") appreciate the opportunity to provide the following comments in response to the Notice of Preparation ("NOP") of a Draft Environmental Impact Report ("EIR") for the Delta Plan. The Delta Stewardship Council ("Council") is charged with a difficult task – it must formulate the Delta Plan and concurrently analyze, at least programmatically, the environmental consequences of that plan under the California Environmental Quality Act ("CEQA") (Pub. Resources Code, § 21000 et seq.). Both tasks must be completed by January 1, 2012, pursuant to the limited timeframe established by the Delta Reform Act of 2009 ("Act") (Wat. Code, § 85000 et seq.). Notably, the Act expressly "does not affect" the Council's duty to comply fully with CEQA. (Wat. Code, § 85032, subd. (f).)

The legal and practical challenges inherent in the task of analyzing impacts of a plan yet to be developed are self-evident, and the SFCWA and SLDMWA remain concerned that overbroad objectives for the content of the Delta Plan will undermine the process as well as the product. To the extent commentary regarding the appropriate scope of environmental analysis of the Delta Plan is possible at this stage, the concerns of SFCWA and SLDMWA are set forth below.

1. Project Description

CEQA requires preparation of an EIR “as early as feasible in the planning process to enable environmental considerations to influence project program and design and yet late enough to provide meaningful information for environmental assessment.” (CEQA Guidelines, § 15004, subd. (b); see also *Berkeley Keep Jets Over the Bay Committee v. Board of Port Commissioners* (2001) 91 Cal.App.4th 1344, 1358.) The SFCWA and SLDMWA recognize that “[t]he timing of an environmental study can present a delicate problem” that is within the lead agency’s discretion to resolve in a manner “consistent with the overall objectives of CEQA.” (*Mount Sutro Defense Committee v. Regents of the University of California* (1978) 77 Cal.App.3d 20, 36; *Stand Tall on Principles v. Shasta Union High School District* (1991) 235 Cal.App.3d 772, 780.)

Here, the Legislature has established a compressed timeline that, to a degree, eliminates the Council’s discretion in this regard. To be useful, however, environmental review should be neither too late nor too early. “[P]remature environmental analysis may be meaningless and financially wasteful.” (*Laurel Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal.3d 376, 396.) Accordingly, in preparing the EIR, the Council must ensure that CEQA’s fundamental prerequisite of an adequate and stable project description is satisfied. (*County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 193 “[a]n accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR”.) The project description in the EIR for the Delta Plan must be sufficiently definitive to provide a vehicle for intelligent public participation. (*Id.* at pp. 197-198.)

A. Project Scope

The NOP generally and appropriately follows legislative direction in the Act for content of the Delta Plan. In several significant areas, however, the NOP suggests the Council will formulate a Delta Plan that extends beyond the authority granted by the Act. While there is no question the Delta Plan is intended to further the coequal goals of providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem as established in the Act, the Plan itself will not “meet” or achieve them. The Plan should contribute to the achievement of the coequal goals by providing guidance, and in some cases direction, for the actions of others, in addition to “promoting” many other activities the Legislature deemed necessary to further the coequal goals. The Act itself recognizes that other local, state, and federal agencies will be central to actually achieving the coequal goals and other objectives of the Act. The regulatory authority of the Council extends only to “covered actions,” yet the NOP’s study area includes the entire “secondary zone,” resulting in a geographic scope that comprises much of the state. Consequently, the proposed scope of the Plan extends beyond the tasks required to achieve the purposes of the Act, as evidenced in its legislative history and intent. The improper scope of the project ultimately leads to

statements in the NOP that the Delta Plan will be enacted as a regulation that will preempt all existing authorities. Nothing in the Act suggests or mandates such an approach. The fundamental purpose of the Delta Plan is to identify, recommend and, where authorized, implement policies, actions, and activities to comprehensively address all stressors on the system (not merely impacts related to operation of the Central Valley Project and State Water Project, but also invasive species, toxics, and other stressors) in furtherance of the achievement of the coequal goals, as well as the inherent subgoals and policy objectives within the purview of the Delta Plan as defined by the Act. (Wat. Code, § 85054.)

B. Project Objectives

Under CEQA, the project description must include “[a] statement of the objectives sought by the proposed project.” (CEQA Guidelines, § 15124, subd. (b).)

A critical component of the objectives which must be reflected in the Delta Plan EIR is set forth in section 85302, which provides:

- (d) The Delta Plan shall include measures to promote a more reliable water supply that address all of the following:
 - (1) Meeting the needs for reasonable and beneficial uses of water.
 - (2) Sustaining the economic vitality of the state.
 - (3) Improving water quality to protect human health and the environment.

In the present situation, the Council was created to formulate the Delta Plan in support of statewide policies for water conservation, water use efficiency and sustainable use of water by offering technical assistance and encouraging funding and incentives to increase regional water management. (Wat. Code, §§ 85200-85204, 85210-85214.) The Legislature defined those policies “inherent” in the achievement of the coequal goals for management of the Delta, which should be the primary if not sole focus of the Delta Plan, in section 85020 of the Act. We reiterate our view that section 85021 of the Act is inappropriately included in the NOP as providing definition to the Delta Plan’s objectives and should not be referenced in the Delta Plan EIR as doing so. Not only is section 85021 clearly separate from section 85020, which specifically identifies the policies “inherent” in achieving the coequal goals for management of the Delta – the proper scope of the Delta Plan – but nowhere in the Act’s clear direction related to the Delta Plan (85300 et. seq.) or anywhere else is there any implication that the general state policy identified in 85021 is to be addressed by the Delta Plan, let alone help define its objectives.

Furthermore, it is beyond the Council’s mandate to otherwise insert itself into what ultimately must remain local water management agency decisions as those agencies work to apply the policies of the Act to the differing and often unique circumstances within their regions. Accordingly, the EIR must state the project objectives in a manner

that sufficiently differentiates between those areas where the Act provides direction and authority to pursue an *action* versus efforts to “promote” actions by others. Moreover, a major “state interest” in the Delta is to maintain the capability of the State Water Project and Central Valley Project to provide sufficient quantities of water reliably to their millions of consumers and continue to support the production of crops from millions of acres of prime farmland, and to continue to support the major economies in their service areas. The EIR must state the project objectives in a manner that adequately reflects these major state and national interests.

C. Accuracy and Completeness of Project Description

As noted above, without an accurate and complete project description, meaningful public participation (as well as interagency consultation) may be thwarted. (*County of Inyo, supra*, 71 Cal.App.3d at pp. 193, 197-198.) Here, the Council intends to use environmental studies, stakeholder perspectives, and other plans such as the Bay Delta Conservation Plan (“BDCP”) to formulate the Delta Plan – and thus the project description – at the same time the Council is preparing the Draft EIR for that Plan. While the SFCWA and SLDMWA acknowledge the difficult task the Council confronts due to the need to undertake a programmatic EIR on a yet-to-be-developed plan as well as the limited timeline established by the Act for completion of both the Delta Plan and EIR, the SFCWA and SLDMWA remain concerned that under such circumstances, prospects for sound planning and legally adequate environmental review may be poor. This concern is of particular significance given the Legislature’s directive for a comprehensive Delta Plan that addresses flood protection, ecosystem restoration and stressor measures as well as water quality, water planning and conservation. (Wat. Code, § 85020.)

Furthermore, the notion that the Delta Plan “will define an integrated and legally enforceable” set of policies and actions that “will serve, among other things, as a basis for future findings of consistency” is an overly broad construct as written and thus, an inaccurate project description. The Delta Plan should not exceed the Legislature’s clear direction in the Act. The only area that the Council, and thus the Delta Plan, arguably has “legal” force is in those limited situations where the Council has authority to review consistency with the Delta Plan. It is only “covered actions” that are subject to consistency review. (Wat. Code, § 85057.5.) The Delta Plan will include recommendations regarding many activities that will not “occur, in whole or in part, within the boundaries of the Delta or Suisun Marsh,” which is the geographic limit of “covered actions.” (*Ibid.*) The Delta Plan, and the EIR prepared to evaluate its impacts, must differentiate between those actions and activities subject to review by the Council and those that are within the management purview of other agencies. The Delta Plan also should be designed to allow for phased integration of appropriate portions of plans it is required to consider or incorporate that will not be completed by January 1, 2012, such as the Central Valley Flood Control Plan and the BDCP.

D. Procedural Concerns

As noted above, the Act expressly “does not affect” the Council’s duty to comply fully with CEQA, including its procedural mandates. (Wat. Code, § 85032, subd. (f).) CEQA provides that the lead agency will issue its Notice of Preparation of an EIR once the proposed action has been defined. (CEQA Guidelines, § 15082, subd. (a).) Here, the lack of any meaningful detail regarding the proposed Delta Plan prevents the public and consulting agencies from commenting, as CEQA contemplates, on the scope of effects to be analyzed in the EIR, the measures that may be identified to mitigate such effects, or alternatives to the proposed action that may feasibly attain the project objectives while lessening or avoiding its significant environmental impacts. (CEQA Guidelines, § 15082, subd. (b).) The NOP does not comply with the minimum requirements of CEQA Guidelines section 15082 because the project description requires significantly greater definition before agencies and the interested public can meaningfully comment on the scope of the environmental analysis. The Council therefore will be required to issue another NOP at such time as the project description is sufficiently complete to enable comment in compliance with the mandatory procedural requirements of CEQA.

Furthermore, the Legislature’s direction to adopt a Delta Plan by a date certain should not, and indeed cannot, be understood to preempt CEQA’s prohibition against commitment to a particular course without first conducting adequate environmental review. (Wat. Code, § 85032, subd. (f); *Laurel Heights, supra*, 47 Cal.3d at p. 394; *Natural Resources Defense Council, Inc. v. City of Los Angeles* (2002) 103 Cal.App.4th 268, 271-272, citing *Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 283 [“[t]he purpose of CEQA is not to generate paper, but to compel government at all levels to make decisions with environmental consequences in mind”].) The statutory timeline likely is insufficient to adequately evaluate the impacts of an exceedingly ambitious Delta Plan; either those proposed actions and/or portions of the program that have not been properly studied cannot be approved or, more appropriately, the Council must formulate the scope and objectives of the Delta Plan in a manner consistent with the time available to complete it.

2. Environmental Setting and Impact Analysis

As discussed above, the scope and objectives of the Delta Plan may not exceed the Council’s statutory authority. Activities within the Council’s authority are subject to CEQA, and the Council must fully comply with its environmental review obligations before implementing any such activities. The EIR for the Delta Plan must analyze, at a level of detail commensurate with the policies and programs of the proposed Delta Plan, the reasonably foreseeable direct, indirect, and cumulative effects of the Plan on a wide range of resources. (*In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings* (2008) 43 Cal.4th 1143.) Such resources include, but are not limited to, state and federal listed species, aquatic biological resources, wetlands and terrestrial resources, including vegetation and wildlife species, surface hydrology including water rights and flood protection, groundwater hydrology, geology and soils,

water quality, seismic stability, aesthetics, agricultural resources, air quality including greenhouse gas emissions, energy resources, land use, historic and cultural resources, health and safety, public services and utilities, recreation, population and housing, transportation and circulation. Analysis of impacts on these resources must account for integration of the Delta Plan with other activities undertaken pursuant to the authority of various local and state agencies.

Toward that end, the “programmatic” character of the Delta Plan EIR should be clarified as to whether this environmental document is intended to serve as a single environmental review covering both site-specific issues as well as program-level policy determinations, or if the Council anticipates subsequent documents tiering from the programmatic review to address site-specific issues or particular problems. If a tiered or supporting document approach is intended, the Delta Plan EIR should clarify the proposed division of issues between the programmatic and site-specific documents.

In promoting the coequal goals, moreover, the Delta Plan and EIR must recognize existing environmental conditions. (CEQA Guidelines, § 15125.) The Delta has undergone significant physical and biological modification over the past 150 years from activities associated with tidal marsh reclamation, dams and diversions, upstream land use changes, and channelization of rivers and tidal channels. Indeed, this estuarine ecosystem is one of the most highly modified and controlled in the world. The historic Delta estuary cannot be fully restored in light of existing conditions within and outside of the Delta that include well-established water supply facilities and millions of acres of existing agricultural, urban, recreational, and other uses.

Furthermore, much of the water in the central and south Delta is foreign, meaning that it is either water of the Sacramento River watershed, which is conveyed through the central and south Delta because of the CVP’s Delta cross-channel, or water previously appropriated to storage in CVP and SWP facilities. Accordingly, even if the water would have reached the central and south Delta in a state of nature, it would have been present at times of excess, not when the water could have been put to beneficial use. The Delta Plan EIR must present the environmental setting fully and accurately to reflect these existing conditions.

A. Biological Resources

The proposed Delta Plan and its EIR must analyze, disclose, and identify measures to mitigate the significant adverse impact of invasive species on fish and wildlife in the Delta in relation to the coequal goals of providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem, especially considering estimates of the Delta’s non-native biomass comprising 90-98% of the total in the ecosystem.

B. Water Supply and Water Quality

The Delta Plan EIR must evaluate potential impacts of the proposed Delta Plan on water supplies, including supply available under CVP and SWP water contracts, surface water flow and drainage patterns, hydrologic and hydraulic effects in the watershed and Delta, surface water elevations, including reservoir elevations, and Delta tidal patterns.

The document also must account for potential impacts to surface water quality that affect beneficial uses. To do so, as noted above, the EIR must provide accurate information regarding the existing environmental conditions in the Delta. (CEQA Guidelines, § 15125.)

The SFCWA and SLDMWA are concerned that assertions in the NOP concerning depleted groundwater basins, for example, are too broadly stated. Not every area that receives and uses CVP and/or SWP water “previously relied upon” groundwater, nor has every area had its basin “depleted.” The EIR must accurately describe existing conditions as well as the existing regulatory setting, recognizing the significant level of area-specific groundwater management that is occurring throughout California.

C. Flooding/Levee Failure

The environmental document for the proposed Delta Plan must address potentially significant impacts to existing and projected flood management facilities and procedures, and the associated risk of additional or more severe flood events and levee failures. In that analysis, the Delta Plan EIR must consider flood management/levee issues in conjunction with land use practices, including but not limited to the resultant hydraulic forces on the levees due to additional subsidence – predicted to be as much as 4.3 additional feet by 2050 (Deverel and Leighton, 2010). It must also address means to reduce the risk of catastrophic levee failure such as rebuilding the peat soils as demonstrated on Twitchell Island.

D. Energy Resources and Greenhouse Gas Emissions

The Delta Plan EIR must account for the greenhouse gas emissions from the existing land use. The drained peat soils emit CO₂ and other greenhouse gases in quantities significant even from a statewide perspective. The Delta Plan EIR must analyze, disclose, and identify measures to mitigate impacts to upstream power generation from reoperation of reservoirs and potential requirements to release more water for in-stream flow. Likewise, the EIR must assess greenhouse gas emissions and climate change impacts, including but not limited to increased carbon generation as a result of shifts from hydropower to other energy sources. (See CEQA Guidelines, App. F.)

E. Agricultural Resources and Land Use

In accordance with the Act, the Delta Plan must protect and maintain the overall quality of the Delta environment, including agriculture. (Wat. Code, § 85054.) In addition, the Delta Plan EIR must analyze potential impacts associated with existing and future planned land uses, including agricultural and urban uses and local agencies' ability to accommodate anticipated growth.

F. Socioeconomic Impacts

The Delta Plan will result in socioeconomic impacts that are directly related to its physical environmental effects. The EIR therefore must analyze, disclose, and identify measures to mitigate the variety of socioeconomic impacts resulting in areas that receive export water supplies due to the loss of those supplies and the lack of reliability of same. The scope of analysis must fully disclose impacts on environmental quality (including but not limited to aesthetic, air quality, water quality, land use, and biological resources impacts), as well as the broader impacts of a reduction in economic activity in these areas as a consequence of water shortage, including significant impacts on state revenues.

3. Methodology

The Delta Plan EIR should employ comprehensive approaches to its analysis of impacts in each resource area. For example, analysis of impacts on biological resources must include assessment of the Delta Plan's effects on the population, productivity and diversity of fish and wildlife species, using life cycle models where such models have been developed.

4. Range of Alternatives

The EIR for the Delta Plan must identify and evaluate the impacts of a reasonable range of potentially feasible alternatives that could lessen or avoid the significant effects of the project. (Pub. Resources Code, § 21002; CEQA Guidelines, § 15126.6; *City of Long Beach v. Los Angeles Unified Sch. Dist.* (2009) 176 Cal.App.4th 889, 920.) CEQA defines the term "feasible" to mean "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors." (Pub. Resources Code, § 21061.1.) Legal feasibility is a further factor set forth in the CEQA Guidelines. (CEQA Guidelines, §§ 15126.6, subd. (f)(1), 15364.) Although no one of these factors establishes a fixed limit on the scope of reasonable alternatives, the Council's authority to carry out alternatives is limited by the Act and there is no point in studying alternatives that cannot be implemented. (CEQA Guidelines, § 15126.6, subd. (a).) The range of alternatives in the EIR thus must be framed in consideration of their legal feasibility. (CEQA Guidelines, § 15126.2, subd. (f); *Marin Mun. Water Dist. v. KG Land Cal. Corp.* (1991) 235 Cal.App.3d 1652, 1666 [legal uncertainty regarding ability to implement alternative justified determination of

infeasibility]; *Kenneth Mebane Ranches v. Superior Court* (1992) 10 Cal.App.4th 276, 291 [an alternative may be legally infeasible if its adoption is beyond the powers conferred by law on the agency].)

And, the alternatives must be to *the proposed project* – i.e., the proposed Delta Plan – and not merely components of that Plan. (CEQA Guidelines, § 15126.6, subd. (a); see *Big Rock Mesas Prop. Owners Ass'n v. Board of Supervisors* (1977) 73 Cal.App.3d 218, 227.) Finally, alternatives to the proposed project must be capable of lessening or avoiding significant project effects. The alternatives considered should offer potential environmental advantages in comparison with the impacts of the project *as a whole*, and must feasibly attain the basic objectives of the project. (CEQA Guidelines, § 15126.6, subd. (a); *Sequoyah Hills Homeowners Ass'n v. City of Oakland* (1993) 23 Cal.App.4th 704; *In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings* (2008) 43 Cal.4th 1143, 1157, 1164.) In the present situation, the range of alternatives must be consistent with the water supply and reliability goals of the Act.

Again, thank you for the opportunity to submit these comments. Please ensure that the SFCWA and SLDMWA are provided both electronic and hard copies of the proposed Delta Plan as soon as it is available, as well as the Draft EIR for the Delta Plan and any other notices, studies, or documents issued for the project pursuant to CEQA.



Byron Buck
Executive Director
State & Federal Contractors Water Agency



Dan Nelson
Executive Director
San Luis & Delta-Mendota Water Authority